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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINALD CHARLES NISBY,

Defendant and Appellant.

2d Crim. No. B209046
(Super. Ct. No. YA068060)
(Los Angeles County)

Reginald Charles Nisby appeals the judgment following his conviction for premeditated attempted murder (Pen. Code, § 664/187, subd. (a)),¹ mayhem (§ 203), and attempted robbery (§§ 664/211). As to each offense, the jury found true the allegation that he personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)), and committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). He contends that evidence was improperly admitted in violation of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), there was no substantial evidence to support the gang enhancements, and there was sentencing error under section 654. Nisby and respondent also claim other sentencing errors. We will remand for partial resentencing and correction of certain sentencing errors. Otherwise, we affirm.

¹ All statutory references are to the Penal Code.

FACTS AND PROCEDURAL HISTORY

On March 14, 2007, Michael Tate was staying with his parents in an area of Los Angeles claimed by the Raymond Crips street gang. Tate had relatives affiliated with a rival "Blood" gang called Denver Lanes. Late in the morning, Tate walked out of the house wearing a red T-shirt and red sneakers. He knew red was the color worn by Denver Lanes and other Blood gangs and that blue was worn by the Raymond Crips.

Nisby drove up in a car driven by another man, parked next to Tate's car, and got out. Tate recognized Nisby who was wielding a .38-caliber revolver. Nisby pointed his gun at Tate and demanded that Tate give him Tate's "flame" and "chain." The "flame" referred to Tate's red T-shirt, and "chain" referred to a chain Tate was wearing around his neck.

Before Tate could respond, Nisby began firing his gun and wounded Tate. When Tate tried to get away, Nisby shot him in the stomach, leg, and arm. Nisby ran to his car and drove away.

Sheriff's deputies and paramedics responded to the scene. Before being taken to the hospital, Tate told Sheriff's Detective Ryan Libe that he had been shot by two Raymond Crips gang members. Tate recognized Nisby, but could not remember his name. Later, Tate identified Nisby who lived two blocks from Tate. In early April, Detective Michael Valento told Detective Libe that Nisby was one of two Raymond Crips who had been shot by rival gang members on March 31, 2007.

In a search of Nisby's car, sheriff's detectives found expended .38-caliber shell casings, a Raymond Crips bandana and belt buckle, a baseball cap with the letters "R" and "C" on it, a flyer announcing a Raymond Crips party, and photographs displaying the Raymond Crips hand sign. Nisby's computer contained photographs showing Nisby making a Raymond Crips hand sign, photographs exhibiting Raymond Crips members and graffiti, as well as members making disparaging remarks about gangs other than the Raymond Crips.

After his arrest, Nisby was interrogated by Detectives Libe and Valento. Nisby was advised of, and waived, his *Miranda* rights. In a 59-minute interview,

Detective Valento questioned Nisby about the March 31 incident in which Nisby had been shot. Thereafter, Detective Libe questioned Nisby about the March 14 Tate shooting. Nisby acknowledged that he had been associating with Raymond Crips members since he was 12 years old, but denied being a member of the gang. He also admitted knowing Tate, but claimed he was in school at El Camino College at the time Tate was shot. An El Camino College professor testified that Nisby had been enrolled in a history class from 10:30 to 11:30 a.m., but had stopped attending class before March 14.

Detective Valento testified as a gang expert. He testified that Nisby was a member of the Raymond Crips and that the shooting was committed for the benefit of the gang. He based his opinion on Nisby's admission that he had been "running with the Raymonds" when he was in school, and on the material found in Nisby's car and on his computer.

A jury found Nisby guilty of the charged offenses, and found each of the gang and firearm enhancements true. Nisby received consecutive sentences of life imprisonment for the attempted murder, life imprisonment for the mayhem, and two years for the attempted robbery. A 10-year gang enhancement and a 25-years-to-life firearm enhancement were added to the sentences for each of the three offenses. The trial court stayed the gang and firearm enhancements on the mayhem and attempted robbery pursuant to section 654.

DISCUSSION

No Miranda Error

Nisby contends the trial court erroneously denied his *Miranda* motion to suppress evidence of his post-arrest interrogation by Detectives Valento and Libe. Nisby does not challenge the sufficiency of the *Miranda* warnings received at the beginning of the interrogation, but argues that new *Miranda* warnings were required when the questioning shifted from the March 31 incident to the Tate shooting. We disagree.

A defendant's statements made during a police interrogation may not be used against the defendant unless he has been effectively advised of his right to counsel

and has waived those rights. (*Miranda*, at pp. 478-479.) After a knowing and intelligent waiver, a defendant need not be readvised of his or her *Miranda* rights before a subsequent interrogation which is "reasonably contemporaneous" with the prior advisement. (*People v. Smith* (2007) 40 Cal.4th 483, 504 [12 hours is reasonably contemporaneous]; *People v. Mickle* (1991) 54 Cal.3d 140, 170-171 [36 hours is reasonably contemporaneous].)

Here, there was a single uninterrupted interrogation that covered two subjects. Nisby cites no authority, and we have found none, suggesting that a change in subject during a single continuous interrogation would ever require a readvisement. In fact, there is authority to the contrary. In *Colorado v. Spring* (1987) 479 U.S. 564, 575-576, the United States Supreme Court concluded that there was no requirement that police inform a suspect of the potential subjects of an interrogation, and failure to do so does not constitute trickery and deception. "[A] suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." (*Id.* at p. 577; see *People v. Duren* (1973) 9 Cal.3d 218, 242.)

Even if we analyze the case as involving two interrogations, there would be no constitutional violation. In determining whether readvisement is necessary, courts consider the amount of time since the waiver was given, a change in the interrogator or the location of the interrogation, an official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and other indicia that the defendant understood his rights. (*People v. Smith, supra*, 40 Cal.4th at p. 504; *People v. Mickle, supra*, 54 Cal.3d at pp. 170-171.)

Here, the advisement was given only 30 minutes before the subject changed to the Tate shooting, and the interrogators and location of the interrogation did not change. Detective Libe took over the actual questioning about the Tate shooting, but Detectives Libe and Valento conducted the investigation together as part of an ongoing process. (*People v. Lewis* (2001) 26 Cal.4th 334, 386.) There was also evidence that Nisby had prior experience with police based on a sustained juvenile petition for robbery,

and the record shows Nisby was mentally alert, spoke freely, understood the questions, and was able to provide detailed answers.

Nisby argues that the deputies were deceptive in switching subjects, and that the transition to the Tate shooting was "immediate" and "unwarned." The record reveals the contrary. When Valento finished asking questions about the March 31 incident, he asked if Nisby had anything else to say. After Nisby responded in the negative, Valento stated that Libe was "gonna talk to you about" the case "you're in here for" (the Tate shooting). In addition, the trial court expressly found that Nisby had not been "worn down" by the detectives or by improper interrogation tactics. (*People v. Whitson* (1998) 17 Cal.4th 229, 248-249.) Nisby also refers to taking prescribed Vicodin earlier in the day but, as the trial court found, Nisby did not appear impaired, and answered questions lucidly and intelligently. (See *id.* at p. 245.)

Substantial Evidence Supports Gang Enhancements

Nisby claims there is no substantial evidence to support the required gang enhancement finding that he committed the offenses with the specific intent to assist in criminal conduct by the Raymond Crips gang. In evaluating the sufficiency of the evidence to support an enhancement as well as a conviction, we review the record in the light most favorable to the judgment to determine whether it discloses substantial evidence of reasonable, credible, and solid value such that a reasonable trier of fact could find the enhancement true. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.) Here, there was substantial evidence supporting the true finding on the gang allegation.

A section 186.22, subdivision (b)(1) gang enhancement requires the prosecution to prove the charged offense was committed "'... for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.'" (See *People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.) Evidence to support the element of specific intent may be shown by a defendant's conduct, words, and all other circumstances surrounding the commission of the acts. (*People v. Craig* (1994) 25 Cal.App.4th 1593, 1597; *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Opinion testimony by a

gang expert is admissible to prove the elements of the enhancement. (*Gardeley, supra*, at pp. 617-620.)

Here, there was substantial evidence that Nisby was a member or associate of the Raymond Crips gang as well as evidence that the Tate shooting was gang-related. Detective Valento testified as a gang expert and opined that Nisby was a member of the Raymond Crips based on his association with the gang since he was 12 years old, photographs of him displaying the gang's hand signs and wearing a gang hat, photographs of Nisby with other Raymond Crips members, photographs of graffiti, and his possession of a flyer for a gang party. Tate also knew Nisby from school and recognized Nisby as a gang member. In addition, there is no requirement that the defendant be a current, active member of a gang in order for a trier of fact to make a true finding on a gang enhancement. (*People v. Villalobos, supra*, 145 Cal.App.4th at p. 322; *In re Ramon T.* (1997) 57 Cal.App.4th 201, 206.) In this case, the evidence at the very least establishes that Nisby had a close connection to the Raymond Crips and permits a reasonable inference that he would take action to advance the interests of that gang.

The record also includes other evidence that the shooting was gang-related. The shooting occurred in Raymond Crips territory, and Nisby recognized Tate's affiliation with a rival gang by demanding Tate give him Tate's "flame" which represented Tate's gang colors.

Nisby emphasizes that he did not use gang signals or announce his own gang affiliation, but the absence of these indications of gang affiliation is not significant in light of the other evidence. Nisby also claims Detective Valento was incorrect in testifying that Nisby admitted being a Raymond Crip during his post-arrest interrogation. Although Nisby steadfastly denied being a Raymond Crip, he admitted a long-term association with the gang, and friendship with its members. These admissions support Valento's assertion that Nisby had admitted an association with the gang.

*Minimum Parole Date, not Enhancement, is Proper Additional
Punishment for Gang-Related Attempted Murder*

Nisby contends the trial court erred by imposing a section 186.22 subdivision (b)(1)(C) gang enhancement on the attempted murder, and that the correct additional punishment is a minimum parole eligibility term of 15 years as set forth in section 186.22, subdivision (b)(5). Respondent concedes, and we agree.

Penal Code section 186.22, subdivision (b) establishes alternative methods for punishing felons whose crimes were committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C) imposes a 10-year enhancement when a defendant commits a violent felony, but does not apply when the violent felony is punishable by imprisonment for life. (§ 186.22, subd. (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004, 1006-1007 [life imprisonment includes a term of years to life].) When the underlying felony is punishable by life imprisonment, section 186.22, subdivision (b)(5) applies. That statute provides that the person may not be considered for parole until he or she serves a minimum of 15 years in prison. Accordingly, the gang enhancement adding 10 years to his sentence should be stricken and replaced by the imposition of the gang enhancement resulting in a minimum parole-eligibility date of 15 years with respect to the attempted murder sentence.

Section 654 Permits Punishment for Attempted Robbery, but not Mayhem

Nisby contends that his attempted robbery and mayhem sentences should have been stayed under section 654 because those offenses were committed against the same victim as part of an indivisible course of conduct and a single intent to murder Tate. We disagree as to robbery, but conclude that the mayhem sentence must be stayed.

Section 654 prohibits multiple punishments for a single act resulting in more than one crime if the crimes are part of a single, indivisible transaction. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) A defendant's intent and objective generally determine whether a course of conduct is divisible. If all of the offenses were incident to one objective, the defendant may be punished for only one of the offenses. (*Ibid.*) But, if the defendant had multiple criminal objectives independent of and not merely incidental

to each other, the trial court may impose punishment for each offense committed in pursuit of each objective even when the offenses were part of an otherwise indivisible course of conduct. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1134.) Whether section 654 applies is a question of fact, and we will affirm any trial court finding that is supported by substantial evidence. (*People v. Martin* (2005) 133 Cal.App.4th 776, 781.)

Here, substantial evidence supports the trial court's implied finding that Nisby had independent and different objectives in committing the attempted murder and attempted robbery. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) The trial court reasonably concluded that Nisby had dual objectives and intents to commit robbery and to murder. (See *People v. Bradley* (2003) 111 Cal.App.4th 765, 770.) The offenses were committed almost simultaneously, but substantial evidence supports the conclusion that Nisby formed an intent to commit both offenses before committing either. Nisby approached Tate and demanded Tate's "flame" and "chain," thus indicating an intent to rob Tate that was separate and independent from his intent to murder.

The mayhem offense is a different matter. Nisby contends, and respondent concedes, that the mayhem and attempted murder were committed as part of a single indivisible act with a single objective. We agree. Both offenses were committed at the same time by firing several shots at the same victim with the same objective and intent to kill. (See *People v. Diaz* (2002) 95 Cal.App.4th 695, 708.) Accordingly, section 654 requires the sentence for mayhem to be stayed.

Other Sentencing Errors

1. Gang and Firearm Enhancements for Attempted Robbery and Mayhem

Respondent contends the trial court erroneously applied section 654 to stay the firearm and gang enhancements on the attempted robbery and mayhem offenses. We agree as to the section 12022.53, subdivision (d) firearm enhancement, but conclude that the section 186.22, subdivision (b)(1)(C) gang enhancement must be stayed as to both offenses.

Our Supreme Court has held that section 654 does not apply to firearm enhancements under section 12022.53. (*People v. Palacios* (2007) 41 Cal.4th 720, 723.)

Therefore, the stay of the section 12022.53 enhancement on the attempted robbery and mayhem offenses constitutes an unauthorized sentence. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) We will direct the trial court to vacate its stay of the section 12022.53 enhancement on both the attempted robbery and mayhem.

The question is unsettled, however, as to application of section 654 to the gang enhancement. Our Supreme Court has divided enhancements according to whether they pertain to the nature of the offender or the nature of the offense, and held that section 654 does not apply to enhancements going to the nature of the offender. (*People v. Coronado* (1995) 12 Cal.4th 145, 156-158.) Application of section 654 to enhancements based on the nature of the offense remains undecided by the Supreme Court, and there is a split in appellate court authority. (*People v. Martinez* (2005) 132 Cal.App.4th 531, 535-536.) We adhere to the view that section 654 applies to conduct-based enhancements such as the gang enhancement under section 186.22, subdivision (b)(1) which pertain to the nature of the offense. (See *People v. Reeves* (2001) 91 Cal.App.4th 14, 56.) Accordingly, we conclude that the trial court did not err in staying the enhancement as to the attempted robbery and mayhem offenses.

2. *Mayhem Sentence*

Respondent asserts that there was an error in the mayhem sentence apart from the section 654 issue. We agree. Nisby was charged with, and convicted of, "simple" mayhem in violation of section 203. The punishment for simple mayhem is a determinate sentence of two, four, or eight years. (§ 204.) The trial court, however, imposed a life sentence which would have been the correct sentence for aggravated mayhem. (§ 205.) We will vacate the mayhem sentence and direct the trial court to impose a determinate sentence as set forth in section 204.

To permit correction of the trial court's error, the case must be remanded for resentencing. Because mayhem is a determinate sentence offense, both the mayhem and attempted robbery offenses must be resentenced pursuant to section 1170.1. After resentencing, the entire sentence for mayhem shall be stayed pursuant to section 654.

DISPOSITION

We strike the section 186.22, subdivision (b)(1)(C), 10-year gang enhancement imposed for the attempted murder, and direct the trial court to impose the 15-year minimum parole eligibility requirement set forth in section 186.22, subdivision (b)(5). We vacate the indeterminate life sentence for mayhem and remand for resentencing and imposition of a determinate sentence for a violation of section 203. We vacate the stay order on the section 12022.53, subdivision (d) firearm enhancement imposed for the attempted robbery.

On remand, the trial court is instructed to hold a new sentencing hearing on the mayhem and attempted robbery convictions in which it shall impose in its discretion the lower, middle, or upper term for those crimes, select principal and subordinate terms consistent with section 1170.1, recalculate the total determinate sentence and determine if the sentences shall run consecutively or concurrently. (See *People v. Neely* (2009) 176 Cal.App.4th 787.) The trial court is further instructed to stay the entire sentence for mayhem pursuant to section 654.

The clerk of the superior court is directed to prepare an abstract of judgment reflecting these actions, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Mark S. Arnold, Judge

Superior Court County of Los Angeles

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